

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

IN RE:

ROBERT GREG KILGORE,

Debtor.

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* CASE NO. 1:05-BK-18096
* CHAPTER 13
*

DECEMBER 28, 2005
CHATTANOOGA, TENNESSEE

BEFORE: THE HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

MEMORANDUM OPINION

FILED
2006 JAN -5 A 11:01
U S BANKRUPTCY COURT
CHATTANOOGA, TN

BE IT REMEMBERED, that the above-styled
cause came on to be heard on the 28th day of December, 2005,
before the Honorable R. Thomas Stinnett, Judge of said
Court, when all parties announced ready to proceed, and the
following is an excerpt of said proceedings, to wit:

**CERTIFIED
COPY**

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1 APPEARANCES:

2 FOR THE DEBTOR:

3 MARK T. YOUNG, ESQUIRE
4 MARK T. YOUNG AND ASSOCIATES
5 2121 HAMILL ROAD
6 HIXSON, TENNESSEE 37343

7 FOR CITIZENS TRI-COUNTY BANK:

8 GARY E. LESTER, ESQUIRE
9 MAYFIELD & LESTER
10 1501 EAST MAIN STREET
11 CHATTANOOGA, TENNESSEE 37404

12 FOR FIRST VOLUNTEER BANK:

13 CHARLES G. JENKINS, JR., ESQUIRE
14 32 COURTHOUSE SQUARE
15 JASPER, TENNESSEE 37347

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1 THE COURT: This chapter 13 case is before
2 the Court on the debtor's motion to impose a stay in this
3 case. The motion is actually to invoke the automatic stay
4 of 362 as to all creditors. This is the first such motion
5 this Court has had to deal with, since the effective date of
6 the Bankruptcy Abuse Prevention and Consumer Protection Act
7 2005.

8 Under that BAPCPA, any individual debtor
9 who has been a debtor in two or more cases that were pending
10 and dismissed within the previous year, does not receive the
11 benefit of the automatic stay at the commencement of his or
12 her bankruptcy case, as provided in section 362(c)(4)(c).

13 It says, as provided in subsection
14 (4)(A)(i)(b), if a single or joint case is filed by or
15 against the debtor who is an individual in this title, and
16 if two or more single or joint cases of the debtor were
17 pending within the previous year but were dismissed, other
18 than a case refiled under section 707(b), the stay under
19 subsection (a) shall not go into effect upon the filing of
20 the later case.

21 In contrast, this language is that the stay
22 under 362(a) shall not go into effect with the more limiting
23 language of 362(c)(3)(A), which provides for termination of
24 the stay, quote, with respect to the debtor, end quote, 30
25 days after the filing of the current case.

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1 It appears that failure to impose the stay
2 is the broader penalty against the debtor and property of
3 the estate, when there are two or more cases involved as
4 opposed to just one. The debtor in this case did have two
5 cases within the previous year that were dismissed other
6 than the case he filed under section 707(b). Thus, the stay
7 does not take effect.

8 The Statute provides a procedure for party
9 in interest, in this case the debtor, to petition the Court
10 to impose the stay. The Court may impose the stay if upon
11 conditions or limitations after notice of a hearing only if
12 the party in interest demonstrates that the filing of the
13 later case, that is, the confirmed pending case, is in good
14 faith as to the creditors to be stayed.

15 The stay is not in effect and would go into
16 effect only upon an entry of an order allowing the stay to
17 go into effect. 4(D) provides under subparagraph (B), a
18 case is presumptively not filed in good faith under certain
19 circumstances, which one or more of which are present in
20 this case. Thus, presumptively, this case was not filed in
21 good faith.

22 The Statute provides that this presumption
23 may be rebutted by clear and convincing evidence to the
24 contrary. Clear and convincing evidence is not defined by
25 the Code, nor is the degree of the burden of proof necessary

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1 other than as clear and convincing.

2 The Court is of the opinion that the
3 phrase, "clear and convincing evidence," speaks to the
4 quality of the evidence and not to the degree of evidence
5 necessary. This is a civil case. The standard as announced
6 in this *Grogan* case by the U.S. Supreme Court is a
7 preponderance of the evidence. However, under this Statute,
8 the evidence produced must be clear and convincing to the
9 trier of fact.

10 The Court may impose the stay only if the
11 case was filed in good faith, that is, that the debtor has
12 rebutted the presumption that the case was filed not in good
13 faith. Whether the case has been filed in good faith
14 requires an examination of many factors. Generally, these
15 factors are referred to as a totality of the circumstances.
16 Some factors may be more important in other cases and less
17 important in others. For example, the frequency of the
18 debtor's filings, that is, does the debtor have a history of
19 repeated filings other than the filings giving rise to the
20 presumption in this case?

21 This is the debtor's third case. However,
22 he had no history of bankruptcy prior to the filing of case
23 No. 03-18361. A second factor to consider in each case
24 would be the reasons for the repeated filings. It appears
25 that these three cases have all been filed for the same or

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1 related reasons, having to do with the debtor's domestic
2 situation.

3 He did testify that during this period of
4 time his father passed away. However, there is no testimony
5 about how that impacted his ability to continue to fund the
6 previous two cases.

7 The Court must consider whether or not
8 there have been significant changes in the debtor's
9 financial condition. The debtor has been self-employed
10 through each of his previous cases, and in this case. The
11 Court sees no significant changes in his financial
12 condition.

13 The Court should also consider significant
14 changes in the debtor's life experiences, such as, the
15 domestic dispute he has had with his wife concerning custody
16 of their two children. In the appropriate case, there might
17 be other changes in life experiences, such as, returning to
18 school, which is not applicable here.

19 The Court should also consider the reasons
20 for the timing of this filing, that is, whether or not it
21 has been to stop a foreclosure or garnishment or the like.
22 It does not appear that any of the three cases were filed
23 merely to stop a foreclosure or repossession. It does
24 appear that each of three cases have been filed with the
25 thought of reorganization of the debtor's finances.

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1 One overriding consideration is whether
2 this debtor, in this case, had demonstrated by clear and
3 convincing evidence his ability to formulate a confirmable
4 plan. In this regard, in this case, at this time, this
5 debtor has failed.

6 Citizens Tri-County Bank has a substantial
7 note secured by the debtor's real property in the
8 approximate amount of \$420,000. The note has a balloon
9 which comes due in approximately one year. The Bankruptcy
10 Code would permit the debtor to amortize this obligation
11 over 60 months. The debtor simply does not have the
12 financial ability to do that.

13 An alternative for the debtor would be to
14 obtain a refinancing of the obligations, either with
15 Citizens Tri-County Bank or with another lender. The
16 property does have substantial equity. The debtor's brother
17 has indicated he could be of assistance to the debtor in
18 refinancing. There is no clear and convincing evidence that
19 this refinancing will, in fact, take place. If the debtor
20 has a commitment for refinancing, the stay would not be
21 necessary.

22 As to First Volunteer, the proof is clear
23 to the Court. But it appears that there are three vehicles
24 involved. One is a Volvo that could be used for
25 over-the-road hauling, but is not presently being used.

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1 Another vehicle is a 1988 Peterbilt, which, apparently, the
2 debtor is unable to locate. A third vehicle is a tractor.
3 There is no proof regarding it at all.

4 The Internal Revenue Service has filed
5 substantial claims in this case against the debtor. The
6 debtor has not filed a tax return since his 2001 return. He
7 attributes this to his domestic problem with his wife.

8 He testified that he has now prepared or
9 has delivered to his accountant sufficient information to
10 have the returns completed by the end of January. He
11 acknowledges it is the same promises that happened in his
12 second case and the returns did not get filed, and the case
13 was ultimately dismissed without confirmation. No doubt the
14 debtor has good intention.

15 It is the Court's opinion that Congress
16 requires something more under 362. And that something more
17 is clear and convincing evidence, not mere speculation. For
18 these reasons, the Court will deny the debtor's motion to
19 impose the automatic stay for 362.

20 Do you have something further?

21 MR. LESTER: No, Your Honor.

22 MR. YOUNG: No, Your Honor.

23 MR. JENKINS: No, sir.

24 THE COURT: We will be adjourned.

25 (End of excerpt.)

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